STATE OF MICHIGAN

COURT OF APPEALS

GEORGE H. YOUNG,

Plaintiff-Appellant,

v

OAKLAND COUNTY DRAIN COMMISSIONER'S OFFICE,

Defendant-Appellee.

UNPUBLISHED
June 17, 2008

No. 277259
Oakland Circuit Court
LC No. 2006-076690-CZ

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

I. Background

In 2005, a majority of owners with riparian rights on Bush Lake petitioned the Oakland County Board of Commissioners (the "Board") to have a normal lake level established for Bush Lake pursuant to Part 307, MCL 324.30701 *et seq.*, of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et seq.*[1] In early 2006, the Board brought an action in circuit court to establish the normal lake level. Plaintiff was a party to that action. Following an evidentiary hearing, the court ordered that the normal lake level be set at 913.6 feet and authorized the construction of a new weir. Defendant subsequently applied for, and the Michigan Department of Environmental Quality issued, a permit to modify the existing weir to effectuate the trial court's order pending design and approval of the new weir.

[1] "Normal lake level" is defined in Part 307 as

> the level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake. A normal level shall be measured and described as an elevation based on national geodetic vertical datum. [MCL 324.30701(h).]

On August 15, 2006, plaintiff filed the instant complaint, alleging that the setting of the normal lake level at 913.6 feet constituted a taking of his property because it would cause flooding on his property. As relief, he sought a declaratory judgment that a taking had occurred, a writ of mandamus to compel defendant to initiate condemnation proceedings under the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51 *et seq*., and an injunction enjoining defendant from constructing the new weir pending the initiation of condemnation proceedings. Defendant thereafter filed a motion for summary disposition under MCR 2.116(C)(8) and (10). The trial court granted the motion under both subrules.

II. Analysis

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). This Court also reviews de novo questions of statutory construction. *Id*. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id*. All factual allegations in support of the claim are accepted as true and are construed in the light most favorable to the nonmoving party. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under this subrule if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10).

The trial court granted defendant's motion under MCR 2.116(C)(8) on the ground that Part 307 of the NREPA does not create a private cause of action. This Court has held that Part 307 and its predecessor do not create a private cause of action for an individual to bring an action to set a normal inland lake level. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 397-398; 651 NW2d 756 (2002); *Wortelboer v Benzie Co*, 212 Mich App 208, 214-215; 537 NW2d 603 (1995). Here, however, plaintiff was not seeking to set or even modify the inland lake level. Rather, he asserted a constitutional claim regarding his right to just compensation for a taking of his property and sought to compel defendant to initiate condemnation proceedings under the UCPA. Therefore, we conclude that the trial court erred in concluding that Part 307 of the NREPA precluded plaintiff's claim.

Nevertheless, we conclude that summary disposition was proper under MCR 2.116(C)(8). Both the United States and Michigan Constitutions contemplate that the government may exercise its power of eminent domain to acquire private property for a public use. However, the government may not take private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Tolksdorf v Griffith*, 464 Mich 1, 2, 7; 626 NW2d 163 (2001). Condemnation proceedings under the UCPA can only be commenced by a government agency that has been granted eminent domain power by statutory or constitutional delegation. *City of Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 631-632; 502 NW2d 638 (1993). The UCPA "does not confer the power of eminent domain, and does not prescribe or restrict the purposes for which or the persons by whom that power may be exercised." MCL 213.52(1).

MCL 324.30710 expressly gives the power to condemn property for purposes of Part 307 of the NREPA only to the Department of Natural Resources (DNR) or the applicable county, not

a delegated authority such as defendant.[2] "Delegated authority" is defined in Part 307 as "the county drain commissioner or any other person designated by the county board to perform duties required under this part." MCL 324.30701(e).

> If the department or the delegated authority determines that it is necessary to condemn private property for the purpose of this part, the department or county may condemn the property in accordance with the uniform condemnation procedures act, Act No. 87 of the Public Acts of 1980, being sections 213.51 to 213.77 of the Michigan Complied Laws. [MCL 324.30710.]

Clear statutes must be interpreted as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). While the DNR or a delegated authority can determine that condemnation is necessary, the Legislature did not include the delegated authority among those with the power of eminent domain. In construing a statute, a court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Ewin v Burnham*, 272 Mich App 253, 255; 728 NW2d 463 (2006). The use of different terms in a statute is presumed to reflect a legislative intent to refer to different things. *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 306; 636 NW2d 272 (2001).

In this case, plaintiff seeks to compel defendant, a delegated authority of the county, to initiate condemnation proceedings for an alleged taking for a purpose prescribed in Part 307 of the NREPA, but only the DNR or the applicable county is authorized to condemn property for this purpose. We conclude, therefore, that plaintiff failed to state a claim for relief that may be granted against this defendant. Accordingly, although we disagree with the trial court's rationale, we conclude that the court reached the correct result in granting defendant's motion for summary disposition under MCR 2.116(C)(8). See *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006). Because summary disposition was proper under MCR 2.116(C)(8), it is unnecessary to address whether summary disposition was also appropriate under MCR 2.116(C)(10).

Plaintiff also argues that the trial court erroneously denied his request for a temporary restraining order ("TRO"), in part, on the basis of a determination that plaintiff had previously waived his right to seek just compensation for any alleged taking. We disagree, because the trial court's ruling denying plaintiff's request for a TRO cannot be interpreted in this manner. Indeed,

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[2] The condemnation by state agencies and public corporations act (CSAPCA), MCL 213.21 *et seq*., authorizes state agencies and public corporations "to take private property necessary for a public improvement or for the purposes of its incorporation or for public use and to institute and prosecute proceedings for that purpose." MCL 213.23. Thus, defendant has eminent domain powers, just not in the context presented by this case. "Statutes that relate to the same subject or share a common purpose are in pari materia and must be read together as one law. In construing statutes that address the same subject, the more recently enacted statute takes precedence over the older statute, especially if the more recent statute is also the more specific statute." *Verizon North, Inc v Pub Service Comm*, 260 Mich App 432, 438; 677 NW2d 918 (2004) (citations omitted). MCL 324.30710 is the more specific and more recently enacted statute and, therefore, governs the power to condemn property for purposes prescribed in part 307 of the NREPA.

the basis for plaintiff's action was that he had a right to just compensation for an alleged taking. Thus, had the trial court determined that plaintiff previously waived his right to seek just compensation, dismissal of plaintiff's complaint would have been warranted on this basis. A dismissal on this basis was never ordered, then or later. Therefore, we reject this claim of error.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen